

BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A SHORELINE
SUBSTANTIAL DEVELOPMENT PERMIT
GRANTED BY KITSAP COUNTY TO
WARREN POSTEN,

DR. AND MRS. WILLIAM STUMP,

Appellants,

v.

KITSAP COUNTY and WARREN POSTEN,

Respondents.

SHB No. 84-53

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

THIS MATTER, a request for review of a shoreline substantial development permit granted by Kitsap County to Warren Posten came on for hearing before the Shorelines Hearings Board; Lawrence J. Faulk, Chairman, Gayle Rothrock, Wick Dufford, Nancy Burnett, Dennis Derickson, and John Pitts, Members, at Bremerton, Washington on February 15, 1985, and at Lacey, Washington on March 1, 1985. Mr. Dufford presided.

Appellants Stump appeared through their attorney, J. Michael

1 Koch. Respondent Kitsap County was represented by Patricia K.
2 Schafer, Deputy Prosecuting Attorney. Respondent Posten represented
3 himself. The proceedings were officially reported by Nancy A. Miller
4 and Bibiana D. Carter.

5 Witnesses were sworn and testified. Exhibits were examined. From
6 the testimony heard and exhibits examined, the Shorelines Hearings
7 Board makes these

8 FINDINGS OF FACT

9 I

10 This matter arises in the community of Keyport in Kitsap County on
11 shorelines of the Puget Sound within the entrance to Liberty Bay.

12 II

13 The proposal for development at issue relates to respondent
14 Posten's waterfront property located at 106 Grandview Boulevard in
15 Keyport in an "urban" environment designation under the Kitsap County
16 Shoreline Master Program.

17 III

18 Appellants Stump are owners of waterfront property adjacent to the
19 Posten's on the east. The parcel is used for a single family
20 residence formerly occupied by the Stumps but now being rented.

21 IV

22 Posten's property is used both for his family's residence and for
23 his business. The existing commercial development on the Posten's
24 parcel is a marine repair business and associated moorage, consisting
25 of connected floating platforms, extending 200 feet seaward from the

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1 bulkhead, and providing five tie-up slips, a boat haul-out facility, a
2 30'x40' fixed dock and a two story shop building on land.

3 V

4 The proposed shoreline development is an expansion and replacement
5 of existing facilities. In total, the project will extend 352 feet
6 waterward from the closest point on the existing bulkhead. Included
7 will be a floating structure containing 24 moorage slips, commencing
8 160 feet offshore, beyond mean lower low water, and extending 192 feet
9 farther into the bay. Paralleling this floating moorage will be a 50
10 foot concrete float to be used for fueling boats. Closer to shore
11 will be a fixed pier elevated above the beach, terminating 122 feet
12 from the bulkhead and connected to a fixed platform extending 70 feet
13 along the shoreline and reaching 52 feet from the bulkhead on its
14 western end and 30 feet from the bulkhead on its eastern end. A new
15 utility building, 28 feet long, 20 feet wide and 10 feet high will be
16 constructed on the upland near the bulkhead.

17 VI

18 Warren Posten applied to the county for a substantial development
19 permit for the project on March 1, 1984. In so doing, he submitted a
20 completed environmental checklist.

21 Notice of the application was published in a newspaper of general
22 circulation in Kitsap County on March 3 and March 10, 1984. A
23 proposed Declaration of Non-significance was circulated to other
24 agencies with jurisdiction in early April of 1984.

25 County staff conducted its own investigation of the application,
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1 including a site visit and review of available information on
2 environmental features of the site. After consideration of all
3 matters investigated or elicited, a Final Declaration of
4 Non-significance was issued by the County on May 7, 1984.

5 VII

6 In connection with his marina project, Mr. Posten applied for an
7 unclassified use permit under the Kitsap County zoning ordinance for a
8 parking lot to be associated with the project, though located on
9 uplands beyond the shoreline area. A hearing on this matter before
10 the County's hearing examiner was held on May 24, 1984. The examiner
11 recommended approval of the parking lot, concluding that 17 spaces
12 should be provided if a 24 slip marina were approved under substantial
13 development permit procedures.

14 VIII

15 After public hearing, the Kitsap County Commissioners approved the
16 shoreline substantial development permit and the unclassified use
17 permit, on September 10, 1984. The shoreline permit included ten
18 paragraphs of conditions, including a limitation to 24 slips and a
19 requirement to provide 17 parking spaces.

20 The County filed the shoreline permit with the Department of
21 Ecology on September 14, 1984. Appellant's request for review of this
22 shoreline approval was filed with this Board on October 15, 1984.

23 A pre-hearing conference was held on November 27, 1984.

24 IX

25 The proposed project would extend into waters deeps enough to

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1 eliminate any need for dredging. The site is not a shallow water
2 embayment.

3 The surrounding area is used for residences and for commercial
4 enterprises and public facilities. The shoreline is extensively
5 bulkheaded.

6 The United States Navy's Undersea Warfare Engineering Station (the
7 "Torpedo Station") is located a short distance to the east of Posten's
8 lot--only two other residential properties intervene. There are
9 extensive shoreline modifications (including a large pier) on the
10 Navy's sizable base. An unattractive fence, extending into the water
11 across the tidelands, separates the base from the community.

12 Next door to Posten on the west is a residence and beyond that is
13 the foot of Washington Street which, at the water's edge, gives way to
14 a boat ramp and pier and moorage facility operated by the Port of
15 Keyport. This facility, while not extending as far into the water as
16 Posten's proposal, is similar in intensity and bulk.

17 Upland of the pier is a sewer pumping station. Across the street,
18 on the northeast corner of Washington and Grandview is a general store
19 and delicatessen.

20 The underlying zoning of the neighborhood, including the Stump and
21 Posten properties, is "business general."

22 X

23 No evidence was presented demonstrating that the proposed marina
24 would have adverse effects on marine life, water quality, water
25 circulation or flushing.

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1 The design of the expanded facility with its pier and deck
2 elevated permanently above the tidal beach should be an improvement in
3 terms of non-interference with natural systems and processes.

4 XI

5 The proposed development will not block views from the Stump
6 residence. What is seen from that vantage, will to some degree be
7 different. The expanded facility will occupy more of the visual field
8 than does the present operation, but views of the bay and the opposite
9 shore will remain substantially unimpaired.

10 The new construction will not be less attractive than the old. In
11 the process of permit review, all over the water buildings were
12 eliminated, a factor which should improve the appearance of the scene.

13 The Board was not persuaded that the proposal will result in any
14 aesthetic loss.

15 XII

16 The development is by its nature in aid of navigation. It was
17 asserted, however, that its presence jutting 352 feet into the bay
18 would cause congestion and actually interfere with passing navigation
19 during times of heavy traffic. This assertion was not proven, and,
20 indeed, knowledgeable testimony was to the opposite effect.

21 Moreover, it was not shown that the configuration of the slips and
22 fuel float would present difficulties in matters of boating ingress
23 and egress.

XIII

The proposed fueling facility would provide a convenience to boaters which is not presently available in the immediate area. The moorage and repair operations to be provided are services for which there is substantial local demand.

XIV

At present there is no mooring buoy for tying up a boat in front of the Stump's property. If the Posten's project were built, such a buoy could not be used without interfering with the floating structures of the marina. This problem is the result of the narrowness of the Stump's property combined with the tide and depth of the site.

Nonetheless, the Posten's permit included a condition that he lease a moorage slip to "the property owner on the east."

XV

Fears were expressed relating to the danger of installing fueling facilities at the site. But, the evidence did not demonstrate that danger to the public from use of petroleum products in this location would be unusual or unacceptable.

Both county and community fire protection authorities reviewed the project and both, in effect, approved it contingent on specified safety precautions being taken. These fire safety measures were made conditions of the permit approved by County Commissioners.

XVI

Concerns were voiced about the effect of the marina expansion on

1 vehicular traffic congestion on Grandview Boulevard. This, like other
2 Keyport streets, is narrow and often congested. Fire engine access is
3 a worry to local residents in light of traffic circulation
4 difficulties.

5 We were not convinced, however, that the Posten's proposed
6 development, with the parking requirements which were imposed, would
7 aggravate existing upland traffic problems.

8 XVII

9 Appellants presented testimony of an appraiser whose opinion was
10 that Posten's development would decrease the value of Stump's next
11 door residential property by \$12,500.

12 Using comparable sales, the appraiser assigned a pre-project value
13 to the Stump's parcel of \$115,000. His post-project value estimate
14 was \$102,500.

15 This latter figure was not, however, based on comparable sales.
16 It was rather, simply, the appraiser's conclusion after various
17 "factors" were, in an unspecified way, considered.

18 Such "factors" included increased land traffic, increased
19 on-street parking, increased noise, increased pollution and natural
20 environmental degradation, blockage of view, increased lack of
21 privacy, lack of use of the waterfront in front of the subject
22 property.

23 There was no proof as to the degree to which any of these
24 "factors" would occur and insufficient proof that any of them would
25 occur at all. The appraiser had no data on these matters. We just

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1 made assumptions. Further, he had no explanation for how any of these
2 assumptions were weighed in his evaluation.

3 We were not persuaded by his testimony that the proposed Posten
4 marina expansion would devalue the Stump's property and decline to
5 hold that it would.

6 XVIII

7 The evidence failed to establish that more than a moderate effect
8 on the quality of the environment is a reasonable probability from
9 pursuing the proposal.

10 XIX

11 Any Conclusion of Law which is deemed a Finding of Fact is hereby
12 adopted as such.

13 From these Findings of Fact the Board comes to these

14 CONCLUSIONS OF LAW

15 I

16 Appellants, having requested review, bears the burden of proof in
17 this proceedings. RCW 90.58.140(7). Pursuant to the Pre-Hearing
18 Order, appellants raised ten issues. Two of these were ruled upon
19 during the hearing in response to motions by respondent County.

20 II

21 Appellant attempted to make a facial attack on the Kitsap County
22 Shoreline Master Program, asking this Board to declare that it fails
23 to comply with RCW 90.58.100 which sets forth requirements for master
24 programs in the underlying statute.

25 The County moved to dismiss this issue and we granted the motion.

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1 The matter is the proper subject of a declaratory judgment action
2 pursuant to RCW 34.04.070 and beyond the jurisdiction of this Board.
3 Seattle v. Department of Ecology, 37 Wn.App. 819, 683 P.2d 244 (1984).

4 III

5 After appellant's case was complete and the County had presented
6 testimony of the procedures it followed to comply with SEPA (State
7 Environmental Policy Act, chapter 43.21B RCW), the County asked for a
8 ruling on the need for an environmental impact statement.

9 After consultation, we then found, as set forth in Finding of Fact
10 XVIII, that the evidence was insufficient to show that the necessary
11 threshold of probable environmental effects would be crossed by this
12 project. ASARCO v. Air Quality Coalition, 92 Wn.2d 685, 601 P.2d 501
13 (1979). Accordingly, we have concluded that the County was justified
14 in issuing a final declaration of non-significance. There was no
15 violation of SEPA.

16 IV

17 The remaining issues essentially raise matters relating to the
18 consistency of the development with Kitsap County Shoreline Master
19 Program (KCSMP) and the Shoreline Management Act (SMA). See RCW
20 90.58.140(2)(b).

21 V

22 The policies of the SMA are set forth in RCW 90.58.020. This
23 section stresses environmental protection and careful planning for
24 shoreline developments. It calls for protection of public
25 navigational rights and emphasizes public access to the shorelines.

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1 A pertinent portion states:

2 Alterations of the natural condition of the
3 shorelines of the state, in those limited instances
4 when authorized, shall be given priority for single
5 family residences, ports, shoreline recreational
6 uses including but not limited to parks, marinas,
7 piers and other improvements facilitating public
8 access to shorelines of the state, industrial and
commercial developments which are particularly
dependent on their location on or use of the
shorelines of the state and other development that
will provide an opportunity for substantial numbers
of the people to enjoy the shorelines of the state.

9 Taken as a whole, RCW 90.58.020 expresses a preference for
10 concentrating development in already developed areas. Yet, within the
11 several constraints set forth, the policy is to foster "all reasonable
12 and appropriate uses."

13 VI

14 We conclude that the proposed development is consistent with the
15 policies of RCW 90.58.020. The site is not a natural area. It has
16 already been substantially affected by human activity. The shoreline
17 designation, resulting from the planning process, is "urban."

18 The project does no demonstrated damage to the ecology or
19 environment. It is a water dependent use, among those uses expressly
20 given priority by the statute, which serves the ends of both public
21 access and public navigation.

22 VII

23 Because extraordinary danger was not demonstrated, the proposed
24 fueling facility was not shown to be inconsistent with the legislative
25 direction to foster "reasonable and appropriate uses."

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VIII

The KCSMP permits commercial development in the "urban" environment. The policy statements relating to such development state:

- Commercial development in shoreline areas should be water related and encouraged to locate in existing commercial areas. However, non-water related uses which provide an opportunity for a substantial number of people to enjoy the shoreline, such as, hotels and restaurants, should be encouraged.
- Commercial development should be compatible in design and scale to the area in which it is located.
- Commercial development should be designed and placed so as to have minimal visual impact on the shoreline.
- Parking facilities should be placed inland away from the immediate water's edge and recreational beaches.

KCSMP, p. 7-10.

IX

The proposed development does not violate the policies for commercial development of the KCSMP. The parking is on the upland away from the shoreline. The visual or general aesthetic impact is not negative. The locale is an existing commercial area and the use is water dependent.

The design and scale are not incompatible with the existing development at the Port's nearby facility or the Navy's "Torpedo Station." Adverse impact on adjacent property was not proven.

X

The KCSMP permits marinas in "urban" environments. The policy

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1 statements relating to marinas are:

- 2 -- Adequate facilities should be provided in
- 3 areas which may be reached from major
- 4 population centers.
- 5 -- Marinas should be designed to minimize the
- 6 impact of water pollution and damage to
- 7 aquatic life.
- 8 -- Marinas should be aesthetically compatible
- 9 with adjacent areas.
- 10 -- Shallow water embayments with poor flushing
- 11 action should not be considered for overnight
- 12 and long-term moorage facilities.

13 KCSMP, p. 7-12.

14 General regulations of the KCSMP for marina include the following:

- 15 B.1. Where marinas are allowed, an evaluation of
- 16 the following and any other concerns deemed
- 17 necessary shall be required: water quality,
- 18 water circulation and flushing, marine life,
- 19 petroleum handling and storage upland, impact
- 20 visual quality and effect upon the environment
- 21 designation and land use.

22 KCSMP, p. 7-12.

23 XI

24 We conclude that the requirements of the KCSMP relating to marinas
25 are met by the proposed expansion project. No adverse environmental
26 effects or unusual risks to the environment were proven. Moreover,
27 the facility was not shown to be improperly located in relation to
accessibility from population centers or in terms of the demand for
the services to be provided at the location in question.

28 XII

29 The KCSMP goals related to use of the shorelines (p. 3-1) are
30 implemented by the specific use regulations and policies for

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1 commercial development and marinas set forth above. Having concluded
2 there is no inconsistency with the specific requirements, we further
3 conclude that the project is consistent with general goals of the
4 KCSMP.

5 XIII

6 The inability to moor a boat to a buoy in front of the Stump
7 property is not an interference with any established rights of the
8 property owners. The physical realities of the situation apparently
9 preclude confining a boat so moored within the Stump's property
10 lines. But even if this were not the case, ownership of the
11 underlying bed does not automatically confer moorage rights on the
12 water surface. Obstructions on the surface to some degree interfere
13 with the public's navigational rights. The owner of the bed has no
14 right to obstruct public navigation, absent public permission.
15 Wilbour v. Gallagher, 77 Wn.2d 306, 462 P.2d 232 (1969). Whether the
16 SMA itself confers such permission is a question on which no showing
17 was made in this proceeding. See RCW 90.58.140(1); 90.58.030(3)(d).
18 On the record before us, therefore, we cannot conclude that the Posten
19 project interferes with unexercised moorage rights of "the property
20 owner on the east." Therefore, the permit condition requiring Posten
21 to lease a moorage slip to such owner is inappropriate.

22 XIV

23 Appellants did not prove that the proposal at issue fails to
24 conform to either the KCSMP or the SMA. Therefore, the County's
25 substantial development permit should (except as noted in Conclusion

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1 of Law XIII) be affirmed.

2 XVII

3 Any Finding of Fact which is deemed a Conclusion of Law is hereby
4 adopted as such.

5 From these Conclusions the Board enters this
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ORDER

Condition No. 10 in the substantial development permit issued by Kitsap County to Warren Posten on September 10, 1984, is stricken. In all other respects, the permit is affirmed.

DATED this 23rd day of July, 1985.

SHORELINES HEARINGS BOARD



WICK DUFFORD, Lawyer Member



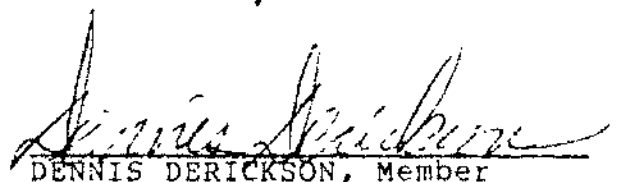
LAWRENCE J. FAULK, Chairman



GAYLE ROTHROCK, Vice Chairman



NANCY BURNETT, Member



DENNIS DERICKSON, Member



JOHN PITTS, Member

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